83-1456

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

P.D. DUGGINS and wife LUCY TAYLOR DUGGINS,
Appellants

v.

THE TOWN OF WALNUT COVE,
Appellee

ON APPEAL FROM THE COURT OF APPEALS
OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

Michael B. Brough
Attorney for Appellants
P.O. Box 323
Carrboro, N.C. 27510
(919) 942-8541
March, 1984

QUESTION PRESENTED

The Town of Walnut Cove's zoning ordinance excludes from most single-family zoning districts all manufactured homes it defines as mobile homes, regardless of the size, dimensions, appearance, value, or mobility of such homes, but allows all manufactured homes defined as modular. Plaintiffs alleged with specificity that each and every justification presumptively supporting this ordinance was not true as a matter of demonstrable fact and that the ordinance therefore violated the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs' complaint was dismissed on a motion for judgment on the pleadings. The question presented by this case is:

Are the factual propositions that presumptively underly and support an

ordinance discriminating against one form of manufactured housing immune from judicial attack, so that a complaint challenging this ordinance on due process and equal protection grounds and alleging with particularity that the ordinance is not rationally related to any legitimate public objective and arbitrarily discriminates between two virtually identical types of manufactured housing can be dismissed on a motion for judgment on the pleadings?

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
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P.D. HANES DUGGINS and wife
LUCY TAYLOR DUGGINS, Appellants

v.

THE TOWN OF WALNUT COVE, Appellee

JURISDICTIONAL STATEMENT

P.D. Hanes Duggins and wife, Lucy Taylor Duggins, appellants, appeal from the final judgment of the North Carolina Court of Appeals, affirming the dismissal of the complaint, entered in this action on September 6, 1983 (discretionary review having been denied by the North Carolina Supreme Court on December 6, 1983).

OPINION BELOW

The opinion of the North Carolina Court of Appeals, which appears in the Appendix at A. 1a, is reported at 63 N.C. App. 684, 386

S.E.2d 186(1983). The order of the North Carolina Supreme Court denying discretionary review is reported at ____ , N.C. ___, 318 S.E.2d 348 (1983).

JURISDICTION

The judgment of the Court of Appeals of North Carolina was rendered on September 6, 1983. A timely petition for discretionary review under N.C. Gen. Stat. Sec. 7A-31 was filed with the Supreme Court of North Carolina on October 11, 1983. The order denying the petition for discretionary review was entered on December 6, 1983 (A. 1).

This appeal is being docketed in this Court within 90 days from the entry of the order denying discretionary review. Michigan - Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 98 L.Ed. 583, 74 S. Ct. 396 (1954). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (2). Erznoznik v. Jacksonville , 422 U.S.

285, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975).

CONSTITUTIONAL PROVISIONS AND ORDINANCE

United States Constitution, Fourteenth Amendment, Section 1: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Town of Walnut Cove Zoning Ordinance:

Section II.B.36. Definition of Mobile Home:

> A detached residential dwelling unit designed for transportation after fabrication on its own wheels and arriving at the site where it is to be occupied as a dwelling unit complete with necessary service connections and ready for occupancy, except for minor and incidential unpacking and assembly operations including, but not limited to, location on jacks or other temporary or permanent foundation, and connection to utilities. Recreational vehicles and modular homes shall not be considered mobile homes. All mobile homes manufactured after June 15, 1976, must comply with standards approved by the U.S. Department of Housing and Urban Development.

Section II.B.48. Definition of Modular Home:

> Any building or closed construction which is made or assembled in manufacturing facilities on or off the building site for installation on the building site other than mobile homes or recreational vehicles. Modular buildings shall comply with all codes applicable to residential construction.

STATEMENT OF THE CASE

The named appellants in this class action, P.D. Hanes Duggins and wife Lucy Taylor Duggins, own a one-acre tract of land within the Town of Walnut Cove in an area zoned for single-family residential use (R-28). In May, 1988, after describing to the town clerk/zoning administrator the type of manufactured home they intended to erect on their property, the Duggins were assured that this home complied with local ordinances. The town then approved the Duggins' application for a building permit and accepted their payment of $288.88 as a water tap fee. In reliance upon these assurances,

the Duggins purchased a new, three-bedroom, two-bath manufactured home, fifty-six feet in length and twenty-four feet in width (a total of 1,344 square feet) with a pitched, shingled roof and hardboard residential siding. However, when the Duggins had their home delivered (in two sections) and prepared to install it on their lot, the town informed them that the home they had purchased was a "mobile home" as defined under the town's zoning ordinance, and therefore not permissible in an R-2S zoning district. Appellants complied with the town's order to stop work and thereafter brought suit in State Superior Court challenging the Walnut Cove Zoning Ordinance on federal constitutiona (and other) grounds.

The Walnut Cove zoning ordinance creates three classes of single-family residences: mobile homes, modular homes and site-built homes. Site-built homes are distinguished from mobile homes and modular homes in that the latter are both constructed in a factory

and assembled or installed at the site. The only definitional distinction between mobile and modular homes is that mobile homes are constructed in accordance with standards promulgated by the U.S. Department of Housing and Urban Development under federal law while modulars are constructed in accordance with the standards established by the North Carolina State Building Code. (If the definitions themselves do not make this absolutely clear, all doubt would have been removed by evidence submitted at trial.) Modular homes and site-built homes are permitted in all single-family residential districts, while mobile homes are allowed to be used as permanent residences in only one district (R-6 MH). Appellees admitted that the zoning ordinance thus effects a *par se* exclusion of all mobile homes in residential districts other than the R-6 MH district, regardless of the size, dimensions, appearance or value of such homes and

regardless of whether such homes (i) have been constructed according to applicable code requirements, (ii) have lost all semblance of "mobility" by being attached to a permanent foundation, or (iii) are otherwise indistinguishable from permitted modular or site-built homes.

The due process and equal protection issues involved in this case were raised very specifically in appellants' complaint, paragraphs 21 and 22. (A. 26a - 38a). At the hearing on appellee's motion for judgment on the pleadings, on appeal to the North Carolina Court of Appeals, and in seeking discretionary review from the North Carolina Supreme Court, appellants argued that the constitutional issues raised could not be decided without giving appellants the opportunity at trial to contest the validity of the underlying factual propositions that presumptively support the ordinance. Only the North Carolina Court of Appeals rendered an opinion discussing the merits of this

case, and it plainly addressed and erroneously rejected appellants' arguments, (A. 9a - 12a).

THE QUESTION IS SUBSTANTIAL

I. Zoning Ordinances Like Walnut Cove's Deny to Millions of Americans The Only Realistic Home Ownership Alternative They Have

With the skyrocketing cost of housing in recent years, it is commonly accepted that more and more Americans have had to postpone or give up their dream of home ownership. Even manufactured homes are beyond the reach of many. But statistics reveal clearly that manufactured homes do provide an ownership alternative for large numbers of families that cannot afford site-built housing. According to data published by the U.S. Department of Commerce, Bureau of Census, C25 Construction Reports, in 1988, of the total 752,000 new, single-family homes sold in this country, 221,000, or 29%, were

mobile homes. In the same year, 82% of the homes purchased for less than $48,000 were mobile homes. Thus, mobile homes constitute an extremely important part in this nation's effort to provide decent housing, especially for those in the lower and middle income brackets.

However, zoning ordinances similar to the one in Walnut Cove have been adopted by cites and counties all across the country, and the effect has been to prevent potential homeowners like the Duggins from purchasing a home and locating it on their own lot under circumstances where there would be no negative impact whatever on the neighborhood, the general public, or the local government.

Of course, the mere fact that an ordinance such as the one in Walnut Cove denies a home ownership opportunity to persons like the Duggins does not constitute grounds for invalidating the ordinance if it is rationally related to a legitimate public objec-

tive. But as this Court recently noted in another context, the costs imposed on those who suffer from governmental regulations such as the one under examination here may appropriately be taken into consideration in determining its rationality. Plyler v. Doe, 457 US. 202, 224, 72 L.Ed.2d 786, 803, 102 S.Ct. 2382, (1982). At the very least, appellants should not lightly be denied the opportunity of presenting evidence to demonstrate that the ordinance is not in fact rationally justified.

II. Contrary to the Decisions of This Court, the Decision Below Treats the Factual Propositions that Presumptively Justify This Ordinance As Unreviewable Legislative Judgments, Thereby Erroneously Making the Ordinance's Validity Irrebuttable.

A. Zoning Ordinances Are Entitled to a Presumption That They Are Rationally Related to a Legitimate Public

Objective And That They Do Not Arbitrarily Discriminate Between Permitted And Non-Permitted Uses, But This Presumption Is Rebuttable.

This court held long ago that, to survive a challenge under the Due Process Clause of the Fourteenth Amendment, a zoning ordinance must bear a substantial relation-

sjective--the

public health, safety, morals, or welfare. Euclid v. City of Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303, 47 S. Ct. 14 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928). While this doctrine has seldom found its way into the reported decisions of this Court in a zoning context during the intervening years, it still remains a viable principle of law. As Mr. Justice Powell stated in Moore v. City of East Cleveland , 431 U.S. 494, 52 L.Ed2d 531, 97 S.Ct. 1982 (1977) (where this Court invalidated a zoning ordinance on due process grounds):

"Later cases have emphasized that the general welfare is not to be narrowly understood....But our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate State purpose." ID at 498, 52 L. Ed.2d 531, 536, 97 S. Ct. at 1935.

Similarly, even while upholding a zoning ordinance against an equal protection challenge, this Court has made clear that the Equal Protection Clause demands that the distinctions drawn between permitted and non-permitted uses must be "reasonable, not arbitrary," and must bear "a rational relationship to a (permissible) state objective" Village of Belle Terre v. Boraas, 416 U.S. 1, 8, 39 L. Ed.2d. 797, 883, 94 S. Ct. 1536, 1548 (1974).

Appellants recognize that it is an extremely formidable task to challenge a zoning ordinance successfully on due process or on equal protection grounds when no suspect classification is present and no fundamental rights or other interests warranting higher levels of judicial scrutiny are

implicated. The ordinance is presumed to be valid, the burden of demonstrating its invalidity is on the party attacking it, and a court will not substitute its judgment for that of the local legislature if it is even fairly debatable whether the ordinance is rationally related to a legitimate objective. Kelley v. Johnson, 425 U.S. 238, 47 L. Ed.2d. 708, 96 S. Ct. 1440 (1976); Euclid v. City of Ambler Realty Co., supra. Or, as this Court stated more recently:

> ...Those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker. Vance v. Bradley, 440 U.S. 93, 111, 59 L. Ed.2d 171, 184, 99 S. Ct. 939, 949 (1979).

But if the foregoing and other decisions reveal that appellants' task is difficult, they also demonstrate that appellants must at least be given the opportunity to present their case. And if they are successful in

convincing a trial court judge that the factual propositions that presumptively support the ordinance in this case could not reasonably be conceived to be true, then the ordinance must fall. Otherwise, the presumption of validity becomes irrebuttable, and a presumed factual relationship is improperly transformed into an unnassailable rule of law. This is the effect of the decision below, and that is contrary to the above-cited decisions of this Court.

B. The Validity of the Ordinance in This Case Depends Upon the Accuracy of Factual Propositions That Are Presumed To Be True But That Are Subject to Disproof at Trial, Not Unreviewable Legislative Judgments As the Decision Below Concludes.

The North Carolina Court of Appeals' decision rejecting appellants' constitutional arguments is apparently based on that

court's conclusion that the ordinance was supported by unreviewable legislative judgments rather than refutable facts. The essence of the opinion below is captured in the following paragraph:

> If any state of facts can be conceived that will sustain the zoning ordinance, the existence of that state of facts must be assumed, (Citation omitted). In this case the ordinance classifies mobile homes differently from modular and site-built homes based on the method of construction. The protection of property values in the zoned area is a legitimate governmental objective. We believe that the method of construction of homes may be determined by a city governing board as affecting the price of homes. The prohibition of such buildings is rationally related to the protection of the value of other homes in the area. We cannot interfere with this legislative decision. 63 N.C. App. 688-89, 386 S.E.2d. 186, 199 (1983)*

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*Although appellants alleged that each of the purported justifications for this ordinance was invalid (see below), the court discussed only the preservation of property values issue. Of course, if the ordinance were supportable on this basis, then the legitimacy of other grounds would not matter.

Appellants acknowledge that the preservation of property values is a legitimate governmental objective and that appellee's ordinance is entitled to a presumption that "the prohibition of (all mobile homes) is rationally related to the protection of the value of other homes in the area." However, appellants alleged and were prepared to show that in fact there is no rational relationship between this ordinance and property values for the reasons discussed below. Since North Carolina law is clear that in considering a defendant's motion for judgment on the pleadings all the factual allegations of the complaint are regarded as true, BGK, Inc. v. United States Fidelity & Guaranty Co., 292 N.C. 668, 235 S.E.2d 234 (1974); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974), the court below must have concluded that appellants' allegations did not raise issues that could be proven or disproven at trial. In other words, the

decision below holds that, as a matter of law, no amount of proof submitted by appellants could lead a trial court judge to conclude that appellee's ordinance was not rationally based. This, appellants contend, is error of a sort that requires clarification and correction by this Court.

Appellants concede that some types of ordinances and regulations cannot be shown to be arbitrary through any factual presentation, and in such cases judgment on the pleadings may be appropriate. For example, in some situations social science may not have advanced far enough so that the policies that underly a regulation can be factually tested in any meaningful way. As this Court stated in Paris Adult Theatre I v. Slaton : "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." 413 U.S. 49, 61, 37 L. Ed.2d. 446, 459, 93 S. Ct. 2628, 2637 (1973). In that case, this Court

upheld an anti- obscenity law even though the relationship between the protection of the public welfare and the prevention of the commercial exploitation of sex could not be empirically demonstrated. In other situations, a regulation may be supported by a policy judgment about how things ought to be rather than factual assumptions about how things are. Thus in Kelley v. Johnson, 425 U.S. 238, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976), this Court held that the trial court would have been justified in dismissing a police officer's due process challenge to a departmental hair style regulation because the rule was justified by policy considerations (the desirability of similarity of appearance for police officers), and no amount of proof could "disprove" such a policy judgment. Id. at 238, 47 L. Ed.2d. at 716, 96 S. Ct. at 1446.

But in the case at hand, the ordinance rests neither upon unprovable assumptions nor irrefutable policy judgments. It clear-

ly bears no relationship to aesthetic policy judgments since it excludes all mobile homes regardless of size, dimensions, or appearance (Complaint, para. 18, A 23a - 24a) and allows modular homes that appellants alleged and were prepared to show are absolutely identical in appearance to excluded mobile homes. (Id).* And each of the other justifications that presumptively support the ordinance can be shown to be untrue as a matter of demonstrable fact. Whether homes constructed to meet the

*Before filing suit, appellants urged appellee to adopt an aesthetically based ordinance that would place restrictions on homes relating to size, appearance, roof pitch, permanency of foundations, exterior siding, etc. to insure that homes are compatible with surrounding neighborhoods. Appellee declined.

federal code are equivalent to homes built in accordance with the state code in terms of construction safety can be proven through expert testimony. (Ironically, while the federal code is enforced through in-plant inspection, the Town of Walnut Cove has no building inspection to enforce the state code. (Complaint, para. 15, A. 21a) Similarly, whether mobile homes *per se* pose any sanitation, wind damage, or fire hazard problems greater than site-built or modular homes, and whether mobile homes *per se* depreciate in value or lower neighboring property values are matters that are subject to proof through the normal presentation at trial of evidence that is available. If, after presentation of the evidence, appellants fail to convince the judge that no local legislator could reach a rational conclusion contrary to appellant's allegations, then appellee prevails. But appellants firmly believe that when all the evidence is presented, and particularly when

the trial court is made to appreciate the fact that home manufacturers produce "mobile"and "modular" models that are identical in every respect except minor, interior construction details having no relationship whatever to the public health, safety or welfare, and that the Walnut Cove ordinance permits the modular (state building code) model but excludes the mobile (HUD code) model, the court will recognize that this ordinance is based on myth, not fact.

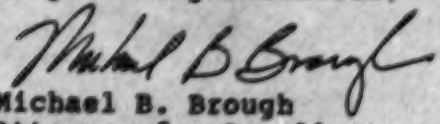
Appellants do not ask this Court to sit as a "superlegislature" or to review the wisdom of the Walnut Cove zoning ordinance. This case is thus very different from City of Brookside Village v. Comeau, 633 S.W.2d 789 (Tex.), cert. denied, ___ U.S. ___, 74 L. Ed.2d. 932, 103 S. Ct. 578 (1982). In that case, the Texas Supreme Court held that the defendant had failed to introduce any evidence at trial to refute the presumption

of the validity of the ordinance restricting mobile homes to parks. The case was thus similar to many others reaching the same result, and therefore this Court's denial of certiorari was not surprising. However, the posture of the instant case makes it entirely different and presents a completely different issue. Here, the question before this Court is not whether a court can presume that an ordinance that discriminates against mobile homes is rationally justified, but whether the presumed justifications for this ordinance are of such a nature that they cannot be refuted. This Court has never addressed this issue, and appellants respectfully request that it do so.

CONCLUSION

For the reasons stated, the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully Submitted,



Michael B. Brough
Attorney for Appellants
P.O. Box 323
Carrboro, N.C. 27510
(919) 942-8541

March, 1983

APPENDIX

APPENDIX A

North Carolina Court of Appeals

Filed 6 September 1983

No. 8217SC544

P.D. HANES DUGGINS AND WIFE
LUCY TAYLOR DUGGINS,

Appellee

v.

TOWN OF WALNUT COVE,

Appellant

Appeal by plaintiffs from Long, Judge. Judgment entered 23 April 1982 in Superior Court, Stokes County. Heard in the Court of Appeals 14 April 1983.

This is an action brought by plaintiffs against defendant Town of Walnut Cove in which they seek (1) a declaratory judgment that the town's zoning ordinance, to the extent it prohibits the use of mobile homes as permanent residences on individual lots zoned for single-family residential use, is in excess of defendant's statutory authority, or alternatively, is unconsitutional as a denial of substantive due process and equal protection; (2) a permanent injunction against the enforcement of the ordinance; (3) damages; and (4) costs.

The named plaintiffs own a tract of land within the Town of Walnut Cove in an area zoned R-20 for single-family residential use. In May 1981 plaintiffs described to defendant's town clerk/zoning administrator the type of manufactured home they intended to erect on their property and were assured this home complied with local ordinances. Defend-

ant issued a building permit to plaintiffs and accepted their payment of $288 as a water tap fee. Subsequently, plaintiffs purchased a mobile home in the good faith belief that it could legally be located on their land in Walnut Cove. However, when plaintiffs had their two-section home delivered and prepared to install it on their lot, they were informed that the home was a "mobile home" as defined under the town's zoning ordinance and therefore was not permissible in the zoning district.

The zoning ordinance creates three classes of single-family residences: mobile homes, modular homes, and site-built homes. Both mobile and modular homes are constructed in factories and assembled or installed at the site. The ordinance defines a mobile home as follows:

> A detached residential dwelling unit designed for transportation after fabrication on its own wheels and arriving at the site where it is to be occupied as a dwelling unit complete with necessary

> service connections and ready for occupancy, except for minor and incidential unpacking and assembly operations, including, but not limited to, location on jacks or other temporary or permanent foundation, and connection to utilities. Recreational vehicles and modular homes shall not be considered mobile homes.

By this definition, the home purchased by plaintiffs is a mobile home.

Modular homes are defined by the ordinance as "(a)ny building or closed construction which is made or assembled in manufacturing facilities on or off the building site for installation or assembly and installation on the building site other than mobile homes or recreational vehicles." Mobile homes are constructed in accordance with federal standards promulgated by the U.S. Department of Housing and Urban Development whereas modulars are constructed in accordance with the N.C. State Building Code. According to the zoning ordinance, modular homes are permitted in any district where site-built homes are allowed.

Defendant's ordinance permits mobile homes in certain districts zoned R-6 MH but prohibits them in the more restrictive residential R-28 districts. The ordinance effects a per se exclusion of all mobile homes in residential districts other than the R-6 MH district, regardless of the size, dimensions, or appearance of the homes, and regardless of whether they have been constructed according to applicable code requirements, have lost all semblance of mobility by being attached to a permanent foundation or are otherwise indistinguishable from permitted modular or site-built homes.

Defendant filed an answer to the complaint and a motion for judgment on the pleadings. After a hearing, the court granted defendant's motion. From the judgment entered, plaintiffs appealed.

Michael B. Brough for plaintiff appellants.

Womble, Carlyle, Sandridge and Rice, by Roddey M. Ligon, Jr., for defendant appellee.

Jordan, Brown, Price and Wall, by R. Frank Gray for amicus curiae North Carolina Manufactured Housing Institute.

WEBB, Judge.

In their first argument, plaintiffs contend that defendant's attempt to "zone out" mobile homes as defined in the ordinance exceeds defendant town's statutory authority both because the zoning enabling act does not authorize defendant to regulate the types of structures used for single-family residential purposes and because defendant's ordinance constitutes a back door attempt to intrude into a field preempted by state and federal law. We disagree.

G.S. 160A-381, which authorizes municipalities to enact zoning ordinances within

specified guidelines, provides in relevant part:

> "For the purposes of promoting health, safety, morals, or the general welfare of the community, any city is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Plaintiffs maintain that the only characteristic under the ordinance that differentiates mobile homes from modular and site-built homes is that they are constructed in accordance with different building codes. Because of this, they interpret the zoning ordinance as having the effect of distinguishing between structures used for the same purpose - single-family residences - based solely on the construction methods and materials used. We do not agree with plaintiffs' interpretation of the ordinance. It is obvious from the

definitions in the ordinance that the different applicable building codes is not the only factor differentiating mobile homes from modular homes. Therefore, the ordinance does not have the effect suggested by plantiffs. Defendant is clearly authorized by G.S. 160A-381 to regulate and restrict the location and use of any buildings or structures for residential and other purposes, and that is exactly what defendant has done in restricting the location of mobile homes.

Similarly, plaintiffs attack the ordinance on the grounds it is an impermissible attempt to regulate construction practices. Defendant's ordinance was not intended to and does not have the effect of regulating construction practices in any way. Rather, the ordinance deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiffs' attempt to read more into defendant's enact-

ment of the ordinance is not warranted. Accordingly, we hold both aspects of plaintiffs' first argument are meritless.

The plaintiffs also challenge the constitutionality of the zoning ordinance. They argue that it violates the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. The Fourteenth Amendment provides in part:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 19 provides in part:

> "No person shall be ... deprived of his ... property, but by the law of the land. No person shall be denied the equal protection of the laws."

The plaintiffs also contend that the enforcement of the ordinance is not within the police power of defendant Town of Walnut Cove. We believe the test as applied in this

case is the same for the due process, law of the land, and equal protection clauses of the United States and North Carolina Constitutions as well as the validity of the exercise of the police power by defendant Town of Walnut Cove. If the enactment and enforcement of the zoning ordinance is rationally related to a legitimate governmental objective, the plaintiff in this case must fail. See Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed. 2d 784 (1980), and Mobile Homes Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E. 2d 542 (1970).

We upheld a similar zoning ordinance against constitutional attack in Currituck County v. Willey, 46 N.C. App. 835, 266 S.E. 2d 52 (1980). The plaintiffs contend Currituck does not control. They argue that Currituck holds that the property owner in that case did not offer evidence sufficient to overcome the presumption of the constitutionality of the ordinance whereas in

this case they make allegations in their complaint which if proven will show that the ordinance is unconstitutional. Assuming plaintiffs are correct in their reading of Currituck, we believe their attack on the Walnut Cove ordinance must fail.

If any state of facts can be conceived that will sustain the zoning ordinance, the existence of that state of facts must be assumed. Mobile Homes Sales, Inc. v. Tomlinson, supra at 669. In this case the ordinance classifies mobile homes differently from modular and site-built homes based on the method of construction. The protection of property values in the zoned area is a legitimate governmental objective. We believe that the method of construction of homes may be determined by a city governing board as affecting the price of homes. The prohibition of such buildings is rationally related to the protection of the value of

other homes in the area. We cannot interfere with this legislative decision.

The plaintiffs argue at length that they can prove, if given the chance, that once mobile homes are in place, they sell at prices comparable to site-built and modular homes. We do not believe we should make this factual determination. This is a matter for the governing body of Walnut Cove. We believe they were rational in their decision.

The North Carolina Manufactured Housing Institute filed a brief in which they make a very persuasive argument that mobile homes should not be excluded from areas in which site-built homes and modular homes may be placed. We believe this is an argument which should be made to the City Council.

Affirmed.

Judges WHICHARD and BRASWELL concur.

APPENDIX B

No. 587P83 SEVENTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

P.D. HAMES DUGGINS AND WIFE
LUCY TAYLOR DUGGINS

v.

THE TOWN OF WALNUT COVE

ORDER DENYING PETITION FOR DISCRETIONARY REVIEW

(8217SC544)

Upon consideration of the Plaintiff's petition in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S 7A-31, the following order was entered and is hereby certified in the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 6th day of December, 1983.

s/ Frye, J.
For the Court"
J. Gregory Wallace
Clerk of the Supreme Court

APPENDIX C

COMPLAINT

P.D. HANES DUGGINS AND WIFE
LUCY TAYLOR DUGGINS

v.

THE TOWN OF WALNUT COVE

Plaintiffs, complaining of defendant, allege:

1. Plaintiffs are residents of the Town of Walnut Cove, Stokes County, North Carolina.

2. Defendant is an incorporated municipality located within Stokes County, North Carolina.

3. Plaintiffs bring this action on their behalf and on behalf of all other persons similiarly situated pursuant to Rule 23 of the Rules of Civil Procedure. The class which plaintiffs seek to represent in this action consists of all persons who wish to install structures defined by the Walnut Cove Zoning Ordinance as "mobile homes" on indi-

vidual lots within the Town of Walnut Cove and to use such structures as permanent residences but are prohibited from doing so by this ordinance. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; and plaintiffs will adequately represent and protect the interests of this class.

4. Plaintiffs are the owners in fee of a one acre tract of land having approximately 248 feet of frontage on Lakeside Drive, a sixteen-foot-wide, paved, public highway within the Town of Walnut Code. This property is more particularly described in a deed recorded in book 268, page 355 of the Stokes County Registry.

5. About the third week of April, 1981, the sister of plaintiff P.D. Duggins, Mrs. Mabel Smith, inquired of Mr. Don Kirkman, who is employed by defendant as its town clerk

and zoning administrator, whether the necessary permits could be obtained to locate a "sectional house" on the lot described in paragraph three. Mrs. Smith informed Mr. Kirkman that the house would be brought to the lot in two sections, and Mr. Kirkman responded that such a home was permissible under town ordinances.

6. In reliance upon the representations made to plaintiff P.D. Duggins' sister, as set forth in paragraph five, plaintiffs, on April 28, 1981, signed an agreement to purchase from Cloverbrook Homes, Inc. a manufactured home (described more fully in paragraph twelve) for the cash price of $24,588. This agreement was understood to be contingent upon approval of plaintiffs' application to obtain financing for the home.

7. On May 8, 1981, plaintiffs went to the office of Mr. Don Kirkman in the Walnut Cove Town Hall to obtain whatever permits the town might require before installing their

home on the lot described in paragraph four. Plaintiffs informed Mr. Kirkman at that time that they wished to locate a home on this lot, that the home would be brought to their property in two sections, that the wheels and axles would be taken of and the tongue removed. Plaintiff P.D. Duggins and Mr. Kirkman both signed a document prepared at Mr. Kirkman's direction entitled "Application for Building Permit," and Mr. Kirkman then filed in his office the only copy of this document. Plaintiffs also paid to defendant through Mr. Kirkman the sum of $288.88 for the privilege of tapping onto defendant's public water system. At this time, plaintiffs were then informed by Mr. Kirkman that, insofar as the Town of Walnut Cove's requirements were concerned, nothing further was required of plaintiffs to enable them to locate their manufactured home on their lot.

8. On May 11, 1981, relying on Mr. Kirkman's assurances as described in paragraph seven, plaintiffs executed a "Retail Installment contract," committing themselves to purchase from Cloverbrook Homes, Inc. the home described in paragraph twelve for the cash price of $24,748 (including $248 sales tax), to purchase property insurance for a period of seven years at a cost of $2,354, to make a cash down payment of $2,474, and to finance the remaining $24,688 for twelve years at an annual interest rate of 17.5 percent. Under this contract, plaintiffs are bound to pay the total sum of $59,852.96 ($61,526.96 less the $2,474 down payment) over a period of twelve years in monthly installments of $418.89.

9. The retail installment contract described in paragraph eight contains provisions whereby plaintiffs conveyed to the seller, Cloverbrook Homes, security for payment of the obligation under said contract.

Plaintiffs also executed a deed of trust (naming Cloverbrook Homes, Inc. as third party beneficiary) with respect to the property owned by them (as described in paragraph four) where they had intended to locate their home. This deed of trust is recorded in book 268, page 355 of the Stokes County Registry.

10. On May 13, 1981, agents of Cloverbrook Homes, Inc. delivered the home purchased to plaintiffs' lot. Shortly after the agents of Cloverbrook Homes began the site work necessary for the property installation of plaintiffs' home, a uniformed Walnut Cove police officer arrived at the plaintiffs' lot and instructed the workmen to cease all work. All work was stopped in compliance with this direction. The next day, on May 14, 1981, Mr. Don Kirkman telephoned plaintiff P.D. Duggins and informed him that the home was in violation of the Town of Walnut Cove's zoning

ordinance and intructed him not to install such home on pain of suffering the penalties prescribed in the ordinance.

11. In response to the orders of defendants agents, plaintiffs have refrained from completing the installation of their home on their lot. The home is now located on the lot adjoining plaintiffs' lot, which adjacent lot is owned by plaintiff P.D. Duggins' sister, Mrs. Mabel Smith.

12. The home purchased by plaintiffs is a new three-bedroom, two-bath house fifty-six feet in length and twenty-four feet in width, containing a total of 1,344 square feet. It has a pitched, shingled roof, and the siding is hard board. When set up on a permanent, brick foundation, plaintiffs' house would be virtually indistinguishable from many site-built homes of comparable dimensions.

13. Plaintiffs, like other members of the class they represent, cannot afford to acquire or construct a site-built or modular

home comparable in terms of dimensions and quality to the home described in paragraph twelve.

14. Plaintiffs' home, like all mobile homes manufactured after June 15, 1976, has been constructed in full compliance with the construction standards established and enforced by the Commissioner of Insurance of the State of North Carolina under the Uniform Standards Code for Mobile Homes Act, which standards embody the construction standard set by the U.S. Department of Housing and Urban Development under the provisions of the National Mobile Home Construction and Safety Standards Act of 1974.

15. Defendant does not enforce the North Carolina State Building Code within the Town of Walnut Cove and therefore has no means of insuring that site-built homes constructed within the town will be constructed in a

manner consistent with the public health and safety.

16. Plaintiffs' lot is located within a district zoned R-28 (low density residential) on the Official Zoning Map of the Town of Walnut Cove. Plaintiffs' proposed use of their lot complies with all provisions of the Walnut Cove zoning ordinance applicable to this R-28 district except that plaintiffs' home constitutes a mobile home as defined in the zoning ordinance and, as set forth more fully in paragraphs seventeen and eighteen, is thereby prohibited in the R-28 district.

17. The Walnut Cove Zoning Ordinance defines a mobile home in the following fashion:

> A detached residential dwelling unit designed for transportation after fabrication on its own wheels and arriving at the site where it is to be occupied as a dwelling unit complete with necessary service connections and ready for occupancy, except for minor and incidental unpacking and assembly operations including, but not limited to, location on jacks or

> other temporary or permanent foundation, and connection to utilities. Recreational vehicles and modular homes shall not be considered mobile homes. All mobile homes manufactured after June 15, 1976, must comply with standards approved by the U.S. Department of Housing and Urban Development.

The home purchased by plaintiffs is a mobile home according to this definition.

18. Under the Walnut Cove Zoning Ordinance, a mobile home (as defined in paragraph seventeen) may be used in any zoning district for a period of up to six months while a site-built house is being constructed or repaired on such lot. However, a mobile home may not be used as a permanent dwelling except on land located within a Mobile Home Residential District (R-6 MH). The ordinance thus effects a per se exclusion of all mobile homes intended for use as permanent dwellings in all other residential districts, regardless of the size, dimensions, appearance, or value of such homes, and regardless

of whether such homes (i) have been constructed in accordance with the standards referenced in paragraph fourteen, (ii) have lost all semblence of "mobility" by being attached to a permanent foundation, or (iii) are otherwise indistinguishable from permitted modular or site-built homes.

19. Defendant's zoning ordinance defines "modular homes" as follows:

> Any building or closed construction which is made or assembled in manufacturing facilities on or off the building site for installation or assembly and installation on the building site other than mobile homes or recreational vehicles. Modular buildings shall comply with all codes applicable to residential construction.

Modular homes, as so defined, are allowed by defendant's zoning ordinance in any district where site-built homes are allowed.

20. Insofar as defendant's zoning ordinance prohibits the use of all mobile homes as permanent dwellings in residential districts other than the R-6 MH district, such ordin-

ance exceeds the statutory authority conferred upon defendant by the North Carolina General Assembly. More specifically:

(a) While defendant has authority under the zoning enabling legislation to regulate the "height, number of stores and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings and land for trade, industry, residence or other purposes," it has been granted no authority to regulate the <u>type of structures</u> that may be used for residential or other purposes.

(b) Defendant's attempt to prevent mobile homes from being used as permanent residences in most single-family districts, when by ordinance definition the only distinguishing characteristics of such structures relate to construction methods and materials, consti-

tutes an impermissible intrusion into a field (i.e., construction regulation) where both federal and state statute clearly demonstrate a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

21. In the alternative, if defendant has been granted the statutory authority to enact the zoning ordinance described above, then insofar as this ordinance prohibits the use of all mobile homes as permanent dwellings in residential districts other than the R-6 MH district, such ordinance deprives plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. More specifically, such ordinance is unconstitutional because it:

(a) Bears no substantial relationship to any objective that may be pursued under the Town of Walnut Cove police power, but repre-

sents an arbitrary and capricious exercise of such power. In particular, such ordinance is unrelated to any legitimate public concern about:

(1) Construction safety, since mobile homes built to the standards referenced in paragraph fourteen are, in all essential respects, equal to or superior to site-built or modular homes.

(2) Sanitation, since mobile homes, like site-built and modular homes, are subject to the provisions of the Ground Absorption Sewage Disposal Act, enforced by the Stokes County Health Department.

(3) Danger from fire since mobile homes constructed to the standards referenced in paragraph fourteen have been demonstrated

statistically to be as safe or safer from the dangers of fire than site-built homes of comparable dimensions.

(4) Wind damage, since mobile homes properly anchored in accordance with the regulations promulgated by the North Carolina Department of Insurance remain secure from wind damage.

(5) Preservation of property values, since the presence of mobile homes per se will not lower neighborhood property values.

(6) Preservation of the tax base, since mobile homes appreciate in value in most cases, and mobile homes on permanent foundations are regarded as real property in Stokes County under the revaluation now taking place.

(7) Transient use, since statistics reveal that most mobile homes are never moved and multi-sectional homes such as that owned by plaintiffs, when placed on a permanent foundation, are almost never moved.

(8) Any other matter cognizable under the police power.

(b) Creates an arbitrary, irrebuttable presumption that all mobile homes have certain characteristics that might justify an exclusionary exercise of the police power, when in fact only some mobile homes (as well as some site-built and modular homes) have such characteristics, and when the town has available the reasonable alternative of dealing directly by regulation with housing characteristics that pose a danger to public health, safety or welfare, rather than excluding mobile homes on a per se basis.

22. In the alternative, if defendant has been granted the statutory authority to enact the zoning ordinance described above, then to the extent that this ordinance prohibits the use of all mobile homes as permanent dwelling in residential districts other than the R-6 MH district, such ordinance denies plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. More specifically, such ordinance creates three classes of property owners who wish to construct homes on their own lots: (i) those who wish to construct residences using site-built techniques; (ii) those who desire to install modular homes; and (iii) those who prefer to live in manufactured homes defined by such ordinance as mobile homes. The ordinance arbitrarily and discriminatorily denies to the third class of perons rights enjoyed by

the first two classes when there is no difference cognizable under the police power.

23. As a result of defendant's actions as set forth above, plaintiffs have been deprived of the lawful use of their home on their own lot. Plaintiffs P.D. Duggins and Lucy Taylor Duggins have thereby been damaged in an amount equal to the fair market rental value of this home, properly installed on such lot, or $350.00 per month, times the number of months between May 14, 1981 and the date of judgment in this action.

24. Defendant's actions as set forth above, including the adoption and enforcement of its zoning ordinance, were all performed under color of state law, and defendant is therefore liable in damages to plaintiffs P.D. Duggins and Lucy Taylor Duggins under 42 U.S.C. Sec. 1983.

WHEREFORE, plaintiffs pray the Court that:

(1) Defendant's zoning ordinance, to the extent that it prohibits the use of mobile homes as defined as permanent residences on individual lots zoned for single-family residential use, be declared in excess of defendant's statutory authority, or, in the alternative, unconstitutional as a denial of substantive due process and equal protection, and therefore void and of no effect.

(2) Defendant be enjoined from enforcing said ordinance against plaintiffs P.D. Duggins and wife Lucy Taylor Duggins as well as against other members of the class they represent.

(3) Plaintiffs P.D. Duggins and Lucy Taylor Duggins have and recover from the defendant a sum equal to $358.88 times the number of months between May 14, 1981 and the judgment on this action.

(4) The costs of this action, including attorneys fees under 42 U.S.C. Sec. 1988 and

expert witnesses fees under G.S. 7A-314 be taxed against defendant.

(5) The Court grant to plaintiffs such other relief as may to the court seem right and proper.

Respectfully submitted this 12th day of October, 1981.

Michael B. Brough
Attorney for Plaintiffs
P.O. Box 323
Carrboro, N.C. 27510
(919) 942-8541

APPENDIX D

No. 8217SC544 SEVENTEEN-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

P.D. HANES DUGGINS and wife LUCY TAYLOR DUGGINS From Orange County

v.

TOWN OF WALNUT COVE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

****

(Filed in the Office of the Clerk, Court of Appeals of North Carolina, February 24, 1984.)

Notice is hereby given that P.D. Hanes

Duggins and wife Lucy Taylor Duggins, the above-named appellants, hereby appeal to the United States Supreme Court from the final judgment of the Court of Appeals of the State of North Carolina, affirming the dismissal of the complaint, entered in this action on September 6, 1983 (discretionary review having been denied by the North Carolina Supreme Court on December 6, 1983, No. 587P83).

This appeal is taken pursuant to 28 U.S.C. Sect. 1257 (2).

Michael B. Brough
Counsel for Appellant
P.O. Box 323
Carrboro, N.C. 27510
(919) 942-8541

AFFIDAVIT OF SERVICE

State of North Carolina
County of Orange

I, Michael B. Brough, depose and say that I am attorney of record for the appellants herein and that, pursuant to Rule 28, Rules of Supreme Court, I served a copy of the

foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows.

On the Town of Walnut Cove, the appellee, by depositing in the U.S. Mail a copy of the foregoing in a duly addressed envelope, with first class postage prepaid, to Roddey M. Ligon, Jr., Womble, Carlyle, Sandridge & Rice, counsel of record for appellee, at his office at P.O. Drawer 84, Winston Salem, N.C. 27102.

All parties required to be served have been served.

This 23rd day of February, 1984.

Michael B. Brough